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Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 141.

THE UNITED STATES, PETITIONER,

v.

FACTORS & FINANCE CO., INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

J. GILMER KÖRNER, JR.,
Attorney for Respondent.

JOSEPH J. KLEIN,
MYRON A. FINKE,
SAMUEL M. FISHER,
Of Counsel.

July, 1932.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 141.

THE UNITED STATES, *Petitioner*
v.
FACTORS & FINANCE CO., INC.

On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF OF FACTORS & FINANCE CO., INC.

QUESTION PRESENTED.

Because of respondent's belief that petitioner's statement of the question presented to this Court does not adequately reflect the specific question arising upon this record, the respondent submits the following statement which it is believed more clearly and adequately presents the question now before the Court:

Within the statutory period for filing claims for refund respondent filed a claim for refund on Treasury Form 843 specifying the year and the amount claimed and stating that its tax liability had not been finally passed upon by the Commissioner, and that its claim was filed in order to save the taxpayer's rights under the pertinent statutes governing refunds of taxes and in order to permit the Commissioner to refund any excess paid over taxes actually found to be due. After the period for filing claims had expired, but before the Commissioner had considered or passed upon its claim, respondent filed with the Commissioner an amendment and amplification of its claim for refund, which set forth fully and completely the

nature of its claim and the supporting data in support thereof. Thereafter the Commissioner took up the claim for consideration, held hearings thereon, determined that respondent had overpaid its taxes in the amount of $32,634.89, and in writing advised respondent to that effect. Thereafter the Commissioner refunded to respondent $12,639.45 and refused to refund the balance of $19,995.44. The question is, whether in the circumstances of this case, a claim for refund for a particular year, timely filed, but which does not set forth the specific items causing an overpayment, could be amplified and amended, before the Commissioner had considered it and acted upon it, so as fully to set forth all the facts and the grounds in support of its claim for the said year.

STATUTE AND REGULATIONS INVOLVED.

Section 284 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 66, provides in part as follows:

> Sec. 284 (a) Where there has been an overpayment of any income, war profits, or excess profits tax imposed by this Act * * * the Revenue Act of 1917 * * * or any such Act as amended, the amount of such overpayment shall * * * be credited against any income, war profits, or excess profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.
>
> (b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—
>
> (1) No such credit or refund shall be allowed or made * * * after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and
>
> (2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

Article 1036 of Regulations 62, promulgated under the

Revenue Act of 1921, which were in force at the time of the filing of the instant refund claim provides in part:

> *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. * * * All the facts relied upon in support of the claim should be clearly set forth under oath.

R. S. 3228 (a) as reenacted in Section 1012 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 342, provides:

> Sec. 3228 (a). All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in section 281 of the revenue act of 1924, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

R. S. 3226 as reenacted in section 1113 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 116, provides:

> Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such

claim to which such suit or proceeding relates. The commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

STATEMENT.

Respondent sued in the Court of Claims to recover an overpayment of $19,995.44 of income and excess profits taxes for the year 1917.

The Court of Claims found, among others, the following facts:

June 15, 1918, plaintiff duly filed its income and profits tax return for the calendar year 1917 and on or about that date paid to the collector the tax shown thereon of $177,338.72.

February 27, 1923, before the Commissioner had made a determination as to the tax liability of the plaintiff, the plaintiff filed its Claim for Refund of $177,606.04 for the year 1917. This Claim for Refund was filed on Treasury Form 843 and recited the amount claimed to be refundable and recited that said amount had been paid on June 15, 1918, and June 30, 1920. This claim was under oath and set forth that it was filed for the purpose of enabling the Commissioner to refund to plaintiff any amount of taxes paid for 1917 in excess of its true tax liability which had not been determined by the Commissioner. The claim stated that "claimant's taxes for 1917 have not been finally passed upon by the Commissioner of Internal Revenue. This claim for refund is filed in order to save the taxpayer's rights under the pertinent statutes covering abatements, credits, and refunds of income and excess-profits taxes of 1917, and to permit the Commissioner to refund to deponent any excess paid over taxes actually found to be due." The filing of this claim was timely and within the statutory period for filing thereof.

The Commissioner took no action with reference to plaintiff's refund claim, either as to its allowance or rejection, either by way of hearing, consideration, or determination thereof prior to July 17, 1925.

On July 17, 1925, and prior to any action being taken upon,

or consideration, or determination given to, the claim for refund filed February 27, 1923, plaintiff duly filed an amendment to its claim for refund, in amplification thereof. In this amendment and amplification plaintiff stated, and specified, that its true tax liability should be determined pursuant to the provisions of section 210 of the Revenue Act of 1917. It asked that its claim theretofore timely filed on February 27, 1923, be allowed in the amount therein claimed. The amendment and amplification, calling the attention of the Commissioner to the pertinent provisions of existing law applicable to plaintiff's refund claim, under which it was entitled to have its true tax liability computed and determined, likewise contained a statement of facts and data in support of its claim. The amendment and amplification also contained the statement that "Before the tolling of the statute of limitations for 1917 taxes and on or about February 27, 1923, taxpayer filed a 1917 refund claim for the full amount of the 1917 tax paid, $177,606.04, and this document is merely the amplification of said claim, setting forth the details in the matter. Taxpayer hereby makes application for assessment under the provisions of section 210, of the revenue act of 1917, for the reasons set forth in the attached sheets, and respectfully requests the tax adjustments shown thereon."

Thereafter the Commissioner entered upon a consideration of the claim for refund and in connection therewith considered the amendment or amplification thereof filed July 17, 1925. The Commissioner appointed a hearing to be held on June 22, 1926, and advised plaintiff that "All of the evidence as to law and facts, which you desire to have considered-by the Bureau in the final determination of the abnormality or abnormalities alleged, must therefore be submitted at once or as far in advance as possible of the date above fixed, in order that the fullest consideration may be given thereto."

On June 22, 1926, the hearing was held in the Bureau at which plaintiff appeared and submitted evidence in support of its refund claim.

Thereafter the Commissioner considered plaintiff's original and amended claims for refund and the evidence submitted in

support thereof and held that the profits tax for 1917 should be computed under section 210 of the 1917 Act, as claimed. Accordingly, he determined that the true tax liability of plaintiff for 1917 was $166,999.17 instead of the amount of $199,634.06 theretofore collected from the taxpayer. He therefore determined that plaintiff had paid as taxes $32,634.89 in excess of the true amount of tax due for 1917.

Accordingly, on January 13, 1927, the Commissioner advised plaintiff that "After a careful review of your protest *and of all the evidence submitted in support* of your contentions *in a conference held in this office on June 22, 1926*, you are advised that the bureau holds that your profits tax for the year 1917 should be computed under the above mentioned provisions [sec. 210, Revenue Act of 1917]," (italics ours) and computed an overpayment of $32,634.89.

Thereafter the Commissioner, on April 8, 1927, executed and mailed to plaintiff a "Certificate of Overassessment" on Treasury Form No. 7776–c, setting forth the true tax to be $166,909.17 and further setting forth that the payments made by plaintiff in excess of its true tax liability were in the amount of $32,634.89. On June 21, 1927, the Commissioner refunded to plaintiff $12,639.45 together with $3,028.24 interest paid thereon, but declined and refused to refund the balance of $19,995.44 of the total amount of $32,634.89 found and determined by him to have been overpaid by the plaintiff for 1917.

This suit was filed in the Court of Claims on January 9, 1929. The Court gave judgment on March 7, 1932, in the amount of $19,995.44 with interest. The Court held that the provisions of the revenue acts are mandatory in their provisions that the Commissioner shall audit the return, determine the correct tax liability, collect any tax found to be due and refund any amount which has been paid in excess thereof, in case the taxpayer has duly filed a claim therefor; that the filing of such claim gives the Commissioner the authority and jurisdiction to make refund of the amounts *found by him* to be properly refundable; that the Commissioner, having authority and jurisdiction so to do, and having determined that an over-

payment had been made, was not limited to the theory, grounds, or items of computation that might be the basis of determining it; and that a refund claim having been timely filed, such claim may be amended or amplified prior to action by the Commissioner on such claim, so as to bring before the Commissioner all the grounds and facts in support of such claim, and that where the Commissioner has before him all such facts and data and considers them in arriving at his determination on the claim, the allowance of the claim is not barred by the statute of limitations even though such amendment and amplification, filed before consideration of the claim, were filed after the period in which the original claim might have been filed.

Respondent believes it to be accurate to state that the Court did not decide that the filing of an amendment or amplification to a timely claim stops the operation of the statute of limitations, but that a timely claim which stays the running of the statute may be amended or amplified prior to consideration of the claim and that an overpayment determined by the Commissioner upon consideration of the timely claim so amended and amplified, is not barred by law, and that upon such determination of overpayment the plaintiff is entitled to maintain its suit for the recovery of the amount so determined.

REASONS FOR DENYING THE WRIT.

Summary of Reasons.

1. The decision in the instant case is ruled by the decision of this Court in *Bonwit Teller & Co.* v. *U. S.*, 283 U. S. 258.

2. The decision in the instant case is consonant with the rule of this Court in *Tucker* v. *Alexander*, 275 U. S. 228, in that obviously the Commissioner was not deceived or misled in passing upon this claim.

3. The decision in the instant case is ruled by the decision of this Court in *Tucker* v. *Alexander*, *supra*, in that the Commissioner did in effect waive the defects in the original claim when he considered and passed upon such claim as amended.

4. The Regulations in force when the instant refund claim was filed were not mandatory.

5. The Statutes under consideration are remedial.

6. The Statute relating to suits for refund makes no provision as to the contents of the claim.

7. The decision in the instant case is not in conflict with the decision by the Circuit Court of Appeals, Second Circuit, in *Art Metal Construction Co.* v. *U. S.*, 47 F. (2d) 558.

8 and 9. The decisions cited on page 5 of the Petition and Transcript of Record do not support the petition for certiorari but support the principle announced in the instant decision in the Court of Claims.

10. The decisions of the Court of Claims on this point are in harmony with the decisions of other courts.

11. The decision in *U. S.* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269, does not support the instant petition for certiorari.

12. The instant decision is not of current importance but merely applies an established principle to the facts of this case and presents only the degree of such application to the facts of this particular case. No administrative difficulty is presented by the decision in the instant case.

1. The decison in the instant case is ruled by the decision of this Court in *Bonwit Teller & Co.* v. *U. S.*, 283 U. S. 258. In that case a timely, though informal and insufficient, claim was amended by the filing of a claim on Form 843 after the period for filing claim had expired. This Court held that taxpayer could maintain its suit in the Court of Claims for the overassessment determined because there was a reasonable or substantial compliance; that the Commissioner was advised of the grounds on which rested the right to refund and that he was not misled or deceived, for the reason that before he made his determination of overassessment he had all the additional information necessary to make such determination. This Court said:

> The question here is to be distinguished from that which would have arisen if, contrary to the taxpayer's insistence, the Commissioner had held that what was done did not constitute a filing of a claim. No statute provides for

review of the Commissioner's determinations in favor of taxpayers when made within the scope of his authority. Such rulings are entitled to much weight. In this case he had already found that in 1919 plaintiff had overpaid its tax in the amount stated. He needed no additional information to enable him to determine whether credit or refund should then be made. There is no suggestion that the allowance was induced by or resulted from fraud or mistake. The facts found disclose that there was a reasonable or substantial compliance with the amendment. The Commissioner within the time allowed was advised of the grounds on which plaintiff's right to refund rested, and was not misled or deceived by plaintiff's failure to file formal claim and was fully warranted in holding that the waiver and earlier documents were sufficient. Tucker *v.* Alexander, 275 U. S. 228, 231, 72 L. ed. 253, 256, 48 S. Ct. 45.

2. The decision in the instant case is consonant with the rule of this Court in *Tucker* v. *Alexander*, 275 U. S. 228. In that case, the regulation under review (Art. 1036 of Regulations 45) was mandatory that all facts should be set forth. The regulations under review in the instant case are not mandatory. (This point is discussed hereinafter.) In *Tucker* v. *Alexander* this Court held:

> *The statute and regulations must be read in the light of their purpose.* They are devised not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. *Failure to observe them does not necessarily preclude recovery.* If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. *If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here,* it may be more convenient for the government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. (Italics ours.)

3. The decision in the instant case is further ruled by the decision of this Court in *Tucker* v. *Alexander, supra,* where it is held that the provisions of the revenue act requiring presentation of a claim for refund before instituting suit to recover such refund, and of the regulations requiring all facts relied upon in support of such claim to be clearly set forth, may be waived by the Commissioner.

In the instant case a formal claim for refund was timely filed but all the facts relied upon were not specified. Thereafter, the claim was amended and amplified so as specifically and fully to set forth all the facts and reasons relied upon in support of the claim. After the claim was so amended and amplified the Commissioner notified the taxpayer that the claim would be taken up for consideration, and advised the taxpayer of a date for a hearing on the claim. Hearings were held on the claim *as amended* and *thereafter the Commissioner proceeded to consider the claim as amended and upon such consideration determined and decided* that the taxpayer had overpaid its taxes in the amount of $32,634.89. Thereafter the Commissioner advised the taxpayer of this fact, and later the Commissioner executed and mailed to the taxpayer a formal Certificate of Overassessment setting forth that the amount paid by the taxpayer in excess of its true tax liability was $32,634.89.

By his action the Commissioner waived any defects which may have existed in the claim as originally filed. In *Tucker* v. *Alexander, supra,* this Court said:

> If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. *We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose.* (Italics ours.)

4. The Regulations in force when the instant claim for refund was filed *were not mandatory.* Those Regulations did not

require that all the facts relied upon in support of the claim must be set forth in the claim. In *Tucker* v. *Alexander*, *supra*, the Court said: "And article 1036 of Treasury Regulations No. 45 (1920 ed.), in force when the claim for refund was filed, requires * * * that 'all the facts relied upon in support of the claim shall be clearly set forth under oath.'" The Regulation here under consideration is contained in article 1036 of Regulations 62, which provides that "all facts relied upon in support of the claim *should be* clearly set forth under oath." (Italics ours.)

Regulations 62 were the Regulations which next followed Regulations 45. The change in the language of the Regulations is significant. Such a change would hardly be inadvertent.

It should be further noted that in both Regulations 45 and 62, the *only requirement* as to the form *of the claim* is that it shall be made on Form 843. *Neither of those Regulations require that all the facts* in support of the claim *shall be contained in the claim.* Regulations 45 merely provides that all the facts in support of the claim shall be clearly set forth under oath. Regulations 62 merely provides that such facts should be so set forth under oath.

Neither the statute nor the regulations prescribe as a *sine qua non* to the *validity* of a refund claim that it shall contain on its face all the facts relied upon in support of it.

The attempt of the Commissioner to construe the statute and the regulations beyond their clear import is unwarranted.

5. The statutes under consideration are remedial and all doubts should be resolved in favor of the claimant in order to effectuate the remedy, and narrow and technical constructions should be avoided. If a substantial compliance with the statute can be found and the Commissioner has been enabled to act on the claim intelligently and in light of all the facts, the Court of Claims properly held the claim to be good.

6. As the Court of Claims has clearly pointed out, the *statute* (sec. 3226 R. S., *supra*) relating to the maintenance of suits in the courts, makes no provision as to the contents of a

claim. It merely provides that a claim for refund must be filed.

7. The decision in the instant case is not in conflict with the decision of the Circuit Court of Appeals for the Second Circuit, in *Art Metal Construction Co.* v. *U. S.*, 47 F. (2d) 558. When that decision is read in connection with the more recent decisions rendered by the same Court, this will clearly appear.

The *Art Metal Construction Co.* case was decided February 2, 1931. In that case it appears that the taxpayer filed a general claim for refund of the nominal amount of $1.00 without specifying the year for which claim was made or the amount claimed as erroneously collected. The Circuit Court of Appeals, Second Circuit, held that this was not a claim for refund but was merely a notice or warning that a refund claim might in future be filed; that the supposed claim called for no action and was not susceptible of any action by the Commissioner; that it bore no evidence that the taxpayer had any present complaint in mind. The Court held that a claim subsequently filed *for the year 1918* specifying the grounds therefor, but filed after the statutory period for filing, was not an amendment to the purported claim originally filed because the original document was not a claim at all but a mere notice that a claim would be filed.

The Court, in deciding *Art Metal Construction Co.*, in effect adopted the same principle laid down by the Court of Claims in the instant case. The Court clearly made its decision in the *Art Metal* case apply only to the facts of that case, and made clear that it recognized the distinction between a claim which was defective and insufficient, and a document which set forth no claim at all for any year or for any specific amount. This distinction is made apparent by the following statement of the Court (47 F. (2d) top p. 560):

> * * * We are not therefore dealing with a claim ineffectually couched, which advised the Commissioner that the taxpayer had come to doubt the validity of any part of the tax. *In such cases* we may assume arguendo that much latitude would be allowed, not only to amend as to

> the amount demanded, but to amplify the grounds of the claim, and perhaps to set out others. (Italics ours.)

The foregoing language of the Court shows that the *Art Metal Construction Co.* decision is not in conflict with the decision in the instant case. Furthermore, the above language of the Court paves the way and leads up to that Court's further decisions on this point, which followed very soon thereafter.

On April 4, 1932, the same Court, speaking through the same Judge, rendered its decision in *McKesson & Robbins, Inc.* v. *Edwards*, 57 F. (2d) 147 (in which reference was made to its earlier decision in *The Art Metal Construction Co.* case) and on the same day it rendered its decision in *Solomon* v. *U. S.*, 57 F. (2d) 150. One week later the same Court rendered its decision in *Henry Prentiss & Co., Inc.* v. *U. S.*, 57 F. (2d) 676.

An examination of those last mentioned cases will show that there is no conflict in the position of the Circuit Court of Appeals, Second Circuit, with that of the Court of Claims in the instant case.

In *McKesson & Robbins, Inc.*, v. *Edwards, supra*, the Court found that the taxpayer timely filed a claim for refund which was insufficient in itself to support an action in court upon its rejection. Subsequently, and after the statutory period for filing claims had expired, taxpayer filed an amendment to its claim. The Commissioner considered the claim in light of the amendment and found an overpayment of tax. However, he refused to repay the amount so found overpaid and taxpayer instituted suit three days thereafter.

The Court held that there had been a compliance with the statute on the part of the taxpayer and that the suit could be maintained. The Court said:

> So far as we can find, he [the Commissioner] was free to reconsider, and his decision was in abeyance until he had finished his deliberation * * *. The plaintiff had every ground for supposing that its claim, which was in fact under consideration, at least until March 27, 1926, had not been finally rejected before * * *. Section 3226, Rev. St., like any other document, is to be read as sensible people would understand it * * *.

The Court further found that in its original claim the taxpayer had made a formal claim for a specific year and in the specific sum of $100,000, and that such claim stated no ground for its claim other than the phrase "amortization of war facilities." The Court held that this was an insufficient claim and did not satisfy the regulations, but that at least it was more than a mere caveat or warning that a claim would in future be filed; that the document did state that the taxpayer had a claim, although defectively. The Court then held that in such a situation "the taxpayer may amend even though the amendment is filed after the period for filing has expired," provided such amendment is filed before the final action of the Commissioner. The Court points to the decided cases, and says:

> But the distinction between what will bear amendment and what will not, is common throughout the land; *it is no doubt one of degree*, like most else, but there seems no reason not to apply it here. (Italics ours.)

The position of the Circuit Court of Appeals, Second Circuit, on this subject is further clarified by reference to its decision in *Solomon* v. *U. S.*, *supra*. There the taxpayer filed an insufficient claim for refund which was rejected, and the rejection scheduled. About two years later taxpayer applied to the Commissioner to have his case reopened to permit him to present a new ground for the allowance of the claim. The Commissioner *refused to reopen* the claim or to reconsider his rejection. The Court held that an amendment came too late when filed after rejection of the claim and that the Commissioner was within his rights to refuse to reopen the claim or reconsider his rejection upon the new grounds offered.

The same Court, in *Henry Prentiss & Co., Inc.* v. *U. S.*, *supra*, further clarifies its position. In the *Prentiss* case the claimant filed claim asking for special assessment for the year 1918. Before action of the Commissioner in rejecting the claim, but after the period for filing claims had elapsed, the claimant amended its claim setting forth grounds for allowance of its claim, different from those contained in the original

claim. The Court held that the filing of the amendment before final action by the Commissioner was sufficient to advise the Commissioner of the grounds upon which the claimant relied and was sufficient predicate for maintaining its claim on the grounds set up in the amendment.

From the foregoing decisions it patently appears that there is not a conflict in decision between the instant decision and that of *Art Metal Construction Co., supra.* As the Court so clearly points out in the *McKesson & Robbins* case, the *distinction between what will bear amendment and what will not bear amendment is one of degree only and the decision in each case must depend upon the factual aspects of each case.*

The decision in the instant case is predicated upon the particular facts in this record and as such is clearly distinguished from the facts in the *Art Metal Construction Co.* case. It is a question of degree only and the Court of Claims in the instant case has determined that degree to be sufficient, just as did the Circuit Court of Appeals, which decided *Art Metal Construction Co., supra,* on which the petitioner relies herein, and which said case was expressly referred to and distinguished by the same Circuit Court of Appeals in *McKesson & Robbins, Inc., supra.* The same Court, one week later, again made the same distinction in its decision in *Henry Prentiss & Co., supra,* and in effect followed its earlier decision in *McKesson & Robbins, Inc.*

8. The recent District Court decisions cited at top of page 5 of the instant petition are no wise in point—either in point of fact or in the application of the rule.

Marble Chair Co. v. *U. S.* (N. D. Ohio) 1932 Prentice-Hall Fed. Tax Service, p. 791, allowed the claims for 1919 and 1920 which had been amended and, as amended, considered by the Commissioner. The other claims which were held by the Court to have been insufficient were so held upon entirely different reasons than those here involved.

Elbee Chocolate Co. v. *U. S.* (E. D. N. Y.) *ibid,* p. 1469, held the claim to be insufficient on the ground that a petition filed in the Board of Tax Appeals was not an amendment to the refund claim, particularly in view of the fact that the claimant

was not the petitioner in the Board, and that the Board is a separate and distinct government body from the Bureau of Internal Revenue.

Bemis Bros. Bag Co. v. *U. S.* (E. D. Mo.) 56 F. (2d) 407, decided that an amendment to a claim made after rejection by the Commissioner, came too late.

The foregoing decisions, instead of being in conflict with the Court's decision in the instant case, are in entire accord with it.

9. The decisions cited in the second paragraph on page 5 of the instant petition do not conflict in principle with the decision below, in the instant case.

Solomon v. *U. S.*, 57 F. (2d) 150, decides that the amendment came too late after the Commissioner had rejected the claim and after he had refused to reopen or consider his rejection.

Jonesboro Grocery Co. v. *U. S.*, 66 Ct. Clms. 320, decides that where a refund claim had been rejected by the Commissioner in 1921, a refund claim filed approximately three years later, and which did not purport to be an amendment or amplification of the former claim, and which was filed after the statute had run, was not a sufficient claim to support the action.

Mutual Life Insurance Co. v. *U. S.*, 49 F. (2d) 662, deals with a situation in which a refund claim was considered and disallowed by the Commissioner in 1927. More than a year thereafter an application was filed *requesting that the claim be reopened* and reconsidered and allowed on an entirely new basis. This the Commissioner refused to do. The Court held that the grounds set up in the application to reopen did not support the action.

Sugar Land Ry. Co. v. *U. S.*, 71 Ct. Clms. 628, presents a situation where a claim for refund was rejected by the Commissioner after the statute had run. After such rejection claimant attempted to amend. The Court held that because the claim had been rejected there was no claim to amend and no claim to which the amendment might attach.

National Cattle Loan Co. v. *U. S.* (E. D. Ill.), 1932 Prentice-Hall Fed. Tax Service, p. 1259. In that case all of the refund claims had been finally acted upon, final conclusions com-

municated to the claimant, and the claims closed during the year 1926. Thereafter, and after the statute had run, the claimant sought to have the claims reopened but this was refused by the Commissioner. The claimant then sought leave to amend its claim but this was likewise refused. The Commissioner held that the attempted amendment came too late.

The brief resume of the above cited cases shows clearly that they have no bearing on the instant issue. They are entirely in accord with the principle announced by the Court of Claims in the instant case.

10. The Court of Claims in its decision in the instant case, and likewise in its two more recent decisions, *Memphis Cotton Oil Co.* v. *U. S.*, No. L–173, decided May 31, 1932, and *Lancaster Cotton Mills* v. *U. S.*, No. J–596, decided May 31, 1932, makes clear the distinction we urge here. That distinction is: (1) Where a claim has been rejected, an amendment comes too late because there is nothing to amend, (2) Where an amendment to a claim is made before the Commissioner has considered or acted upon a claim, and where the Commissioner considers and acts upon the claim *as amended*, with all of the facts and circumstances before him in so considering and acting upon the claim, his rejection of the claim will sustain an action for recovery of the refund upon the grounds set out in such amendment.

The decided cases, we believe, unanimously agree in principle and in result with the conclusions of the Court of Claims in proposition (1) just above set out.

With proposition (2) above, the decided cases are likewise in accord in principle, and the distinction made by those decisions where the result is different *is one of degree only* and turns solely upon a question of fact in each case. Such cases involve only the application of the principle to the facts of each case.

We respectfully disagree with the statement in the instant petition (near bot. p. 5) where it is said that the Court of Claims expressly recognized a conflict between its decision in *Memphis Cotton Oil Co.* (probably meaning *Lancaster Cotton Mills*) and

the decision of the Circuit Court of Appeals in *Art Metal Construction Co.* A reading of the Court's decision in *Lancaster Cotton Mills* discloses that the Court said: "We think this holding *as a general rule* is too limited as concerns the jurisdiction and authority of the Commissioner to act in the premises after the expiration of the period within which he may act without a claim, and as concerns the right of amendment before action is taken by the Commissioner." The Court then specifically points to the decisions of the Circuit Court of Appeals in *McKesson & Robbins, Inc.* and *Henry Prentiss & Co., Inc.*, wherein the Circuit Court of Appeals itself (the Court which decided *Art Metal Construction Co.*) in effect decides that *as a general rule* the decision in *Art Metal Construction Co.* was too limited and that such a general rule would not be applied in those cases but that on the contrary its application *would depend on the degree* to which it was applicable to a given state of facts. Thus it would seem to be apparent that the Court of Claims did not "expressly recognize" a conflict but, on the contrary, recognized that the *Art Metal Construction Co.* decision was to be applied only to the degree the facts of each case warranted. In other words, the Court of Claims took the same position relative to the *Art Metal Construction Co.* decision as did the Circuit Court of Appeals (which rendered it) in its more recent decisions, viz., *McKesson & Robbins, Inc.* and *Henry Prentiss & Co., Inc.*

11. *U. S.* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269, has no bearing on this issue in support of petition for certiorari. In that case claimant filed refund claim stating special assessment as the sole grounds in support thereof. Hearings were had and briefs filed and considered on that point. Upon partial rejection of the claim, suit was filed in the Court of Claims and an entirely new ground for refund was set up *in that suit. This new ground had never been presented to the Commissioner* at any stage of the consideration of the claim by him. Claimant contended that it would have been futile to present this new matter to the Commissioner because the Commissioner would surely deny it. The Court of Claims held that the

claim was good because claimant was not called upon to do a futile thing. This Court held that the Commissioner was entitled to be informed of any ground upon which claimant relied, and that since the Commissioner had no knowledge of such new grounds he could not have taken action with respect to it, and consequently there could not have been a waiver of a technical requirement because the Commissioner could not waive that of which he had no knowledge.

The decision of this Court was predicated upon a factual situation exactly opposite to that in the instant case. Here the Commissioner had all the facts before him *before he took up the claim for consideration*. The claim had been amended before any hearing or consideration had been had in the case. The Commissioner was fully advised and acted in light of all the facts.

The *Felt & Tarrant Mfg. Co.* case tends strongly to support the decision in the instant case, and offers no support whatsoever for the instant petitioner for writ of certiorari.

12. The instant case is not one of current importance. No apparent confusion exists in the decisions of the Courts on the point at issue here. In principle the Courts are all in harmony with each other, and are in harmony with the Supreme Court.

The *principle* involved is a settled principle. The application of that principle must of necessity depend upon the facts arising in each case. As we have pointed out, the Courts view the problem now as merely one of degree—in the application of an established principle.

The many cases which are arising in the courts are for the determination of the degree to which the established principle may be applied to the widely varying factual aspects of those numerous cases. We believe it unnecessary to argue that this Court may not permit itself to be called upon to hear and decide every such case and to direct the application of an established principle to the many cases wherein there is involved only the degree to which the facts support the principle.

A cogent reason for denying the writ in the instant case is pointed out by the Circuit Court of Appeals, Second Circuit,

in *McKesson & Robbins, Inc.* v. *Edwards, supra* (the same Court which rendered the decision in *Art Metal Construction Co.* v. *U. S., supra,* which is alleged by petitioner to be in conflict with the instant decision below) wherein the Court states that the distinction between those claims which will bear amendment and those which will not, is one of degree only. That Court distinguished its decision in *Art Metal Construction Co.* from its decisions in *McKesson & Robbins* and *Henry Prestiss Co.* and held that the claims in the latter cases would bear amendment. *The Court of Claims distinguished the instant case in like manner.* There is no conflict. The Court of Claims recognized that same degree of factual difference and its decision is in accord with the principle announced in the other cases, including *Art Metal Construction Co.* v. *U. S., supra.*

It is difficult to conceive how a decision by this Court in the instant case could be authoritative or decisive in every aspect of the application of this principle. The principle is so clearly stated by the Court below that the Treasury Department should find little difficulty in administering it.

That principle is sound. It is equitable. It is just.

No conflict is to be found in the decisions of the Courts on this principle.

CONCLUSION.

Wherefore, it is respectfully submitted that the decision of the Court of Claims was correct and in accordance with law; that this case does not present questions justifying the consideration of this Court on writ of certiorari; and that the petition for writ of certiorari should be denied.

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